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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SEAN GREGORY,

Plaintiff and Respondent,

v.

CITY OF LOS ANGELES, et al.,

Defendants and Appellants.

B211990

(Los Angeles County
Super. Ct. No. BC350657)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Reversed.

Carmen A. Trutanich, City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendants and Appellants.

Konell Ruggiero & Konell and Cheryl Konell Ruggiero for Plaintiff and Respondent.

INTRODUCTION

This is an appeal from a judgment following a jury trial in an employment discrimination case and from an order denying a motion for judgment notwithstanding the verdict. For the reasons hereafter set forth, we reverse the judgment and order of the Los Angeles County Superior Court.

FACTUAL AND PROCEDURAL SYNOPSIS

Sean Gregory (Gregory) is employed by the City of Los Angeles in the police department (Department). His grievances are against the City, Richard Parks, and certain other individuals and co-employees of the Department.

Gregory's complaint filed on April 12, 2006.

Gregory filed his unverified complaint on April 12, 2006, as an unlimited civil cause, alleging that he suffered damages by reasons of the actions of the named defendants. His complaint alleges six causes of action as follows:

- “1. Employment Discrimination [Cal. Gov. Code § 12945.2(1)]
- “2. Violation of Sick Leave Rights [Cal. Lab. Code §§ 233-234]
- “3. Retaliation [Cal. Gov. Code § 12[9]40(h)]
- “4. Intentional Infliction of Emotional Distress
- “5. Negligent Supervision [and]
- “6. Violation of Personal Rights [Cal. Civil Code § 52.1]”

In addition to the City, and Parks, Gregory sued the following individuals: William J. Bratton, Andrea Lucie, Eugene Bedolla, John Incontro, Pat Hernandez, Robert Barnes, Kelly Muldorfer, John Lortz, and 10 fictitious defendants.

Appellants summarize the factual allegations of Gregory's complaint as follows: discrimination and retaliation for exercising the right to use family medical leave, family bonding leave, and sick leave; comments by a supervisor that Gregory is lazy and unproductive; a misconduct complaint regarding an alteration to Gregory's service weapon, which was adjudicated in his favor; a performance rating that did not meet with Gregory's satisfaction because it indicated low productivity and excessive use of sick

time and it could possibly hamper his aspirations for promotion; retaliation for filing a complaint with the Department of Fair Employment and Housing and a claim for damages with the City; a negative comment card and counseling regarding Gregory's work-product; and denial of annual training in detective school.

Pertaining to Gregory's fourth cause of action for intentional infliction of emotional distress, appellants note that the allegations are against all defendants except the City and claim damages for pain and suffering, extreme and severe mental anguish, and emotional distress arising out of and in the course of Gregory's employment, and the need for medical treatment, but also contain allegations incorporating the first three causes of action and the factual allegations of the complaint.

City's answer to unverified complaint, filed on May 24, 2006.

On May 24, 2006, City filed its answer to Gregory's unverified complaint, denying generally and specifically all the allegations therein, and alleging 22 affirmative defenses. Pertinent to this appeal is affirmative defense No. 12 which states: "Plaintiff's Complaint, and each cause of action set forth therein, is barred to the extent that Plaintiff seeks recovery for emotional distress arising out of the normal course and scope of employment, such claim is barred by the California Worker's Compensation Act."

Answer of Bratton, Parks, Bedolla, Incontro, Hernandez and Barnes, filed on July 26, 2009.

On July 26, 2009, the above captioned defendants filed their answer to Gregory's unverified complaint, denying generally and specifically each and every allegations contained therein and alleging 22 affirmative defenses, the 12th of which is a verbatim repeat of the City's 12th affirmative defense claiming the bar of the California Worker's Compensation Act.

Defendants' motion in limine directed to Gregory's claim for damages for intentional infliction of emotional distress.

Before trial, defendants filed a motion in limine asserting that Gregory's claim for intentional infliction of emotional distress was barred by the Worker's Compensation Act

because the claim arises out of Gregory's employment and is thereby barred by the exclusivity of the Act. Gregory filed opposition in which he made several contention including the contention that the motion should be denied as an improper motion for summary judgment. The court ruled in favor of Gregory on the ground that the motion was not a determinative motion for summary adjudication.

Trial briefs filed by both parties addressing the Worker's Compensation Act exclusivity as to the intentional infliction of emotional distress claim.

Defendants' trial brief addressed the fourth cause of action in Gregory's complaint for intentional infliction of emotional distress and emphasized the exclusivity of the Worker's Compensation Act pertaining to this claim for damages.

Gregory's trial brief contended that the alleged conduct giving rise to the intentional infliction of emotional distress claim, employment discrimination and retaliation in violation of statute and fundamental public policy, is an exception to the Worker's Compensation Act exclusivity.

Jury trial of the matter.

During the course of the trial which commenced on April 4, 2008, defendants filed a motion for nonsuit contending that the intentional infliction of emotional distress claim was barred by the exclusivity of the Worker's Compensation Act. Gregory's opposition consisted of again asserting that the conduct complained of was an exception to exclusivity. The motion was denied but Gregory dismissed certain causes of action.

The jury returned verdicts in favor of defendants on the statutory employment discrimination and retaliation causes of action brought under Government Code sections 12940, subdivision (h), and 12945.2, subdivision (I)(1), but deadlocked on the jury instruction regarding intentional infliction of emotional distress. Defendants then moved for a directed verdict on the intentional infliction of emotional distress claim on the grounds that the verdicts on the statutory employment discrimination and retaliation causes of action rendered the claim on the fourth cause of action barred by Workers'

Compensation Act exclusivity The trial concluded on May 13, 2008, which resulted in a verdict in favor of Gregory on the intentional infliction of emotional distress claim.

Judgment on the jury verdicts.

On July 9, 2008, a judgment was entered in favor of defendants on the first cause of action for employment retaliation under Government Code section 12940, subdivision (h) and the third cause of action for employment discrimination and retaliation for exercising the right to family medical leave and family bonding leave under Government Code section 12945.2, subdivision (l)(1) but against defendants Parks and Hernandez on the fourth cause of action for intentional infliction of emotional distress. The jury awarded Gregory \$85,000 in emotional distress damages.

Defendants' motion for JNOV on the intentional infliction of emotional distress cause of action.

On August 8, 2008, defendants filed their motion for judgment notwithstanding the verdict on the intentional infliction of emotional distress cause of action. Defendants reiterated their ground that the jury's verdicts on the employment discrimination and retaliation causes of action rendered the intentional infliction of emotional distress claim barred by the Workers' Compensation Act exclusivity and that the claim should not have been presented to the jury for determination. Gregory's opposition to the motion for JNOV contended that the defendant's retaliation in violation of fundamental public policy is an exception to the Workers' Compensation Act exclusivity. Defendants' JNOV motion was called for hearing, argued, and taken under submission on October 1, 2008.

In its October 2, 2008, minute order, the trial court denied defendants' JNOV motion as to Parks but granted the motion as to Hernandez, holding that substantial evidence supported the intentional infliction of emotional distress verdict against Parks but not Hernandez.

Appeal of judgment and order denying JNOV motion.

On October 31, 2008, the City and Parks filed and served their notice of appeal, from the judgment and from the order denying their motion for JNOV.

Defendants' appeal was timely filed on October 31, 2008.

DISCUSSION

Standard of review.

Stripped of all causes of action by virtue of the jury's determinations and Gregory's voluntary dismissal of other causes of action, Gregory is left with the fourth cause of action for intentional infliction of emotional distress. It appears to be undisputed that the emotional distress which Gregory is asserting occurred while he was in the course and scope of his employment. It appears to this court that the matter is reduced to whether or not this common law tort is subject to the rule of exclusivity contained in the Worker's Compensation Act. Such a determination is one which requires this court to examine the issue de novo as a matter of law based upon undisputed facts demonstrated in the record on appeal. With this explanation, we now examine the issue under the de novo standard of review.

Appellants' contentions.

Appellants maintain that the issue requires this court to examine a series of California Supreme Court precedents and to focus on what is at issue and what is not at issue in this instance. Appellants contend that Gregory's arguments misconstrue the issue to be decided by this court. First of all, appellants assert that the issue is not one of whether Gregory was injured during the course and scope of his employment because it is undisputed that the injury complained of in the fourth cause of action occurred during Gregory's employment. Secondly, appellants contend that the true issue on appeal is whether the exclusivity of the Worker's Compensation Act prohibits any recovery on the fourth cause of action as a matter of law. We conclude that appellants have properly

oriented this court to the issues to be decided and we now proceed to examine and apply California Supreme Court precedent to these issues.

Appellants claim that Gregory's intentional infliction of emotional distress cause of action is barred even though Gregory has incorporated allegations of employment discrimination and retaliation in violation of statute and fundamental public policy, citing *Shoemaker v. Myers* (1990) 52 Cal.3d 1 as authority. The plaintiff in *Shoemaker* alleged a *Tameny* claim (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 (*Tameny*)) and an intentional infliction of emotional distress claim that incorporated allegations of the *Tameny* claim, which asserted a wrongful discharge in retaliation for activity protected by a whistleblower statute (former Gov. Code, § 19683) and exercise of rights under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). Those claims were dismissed by the trial court after sustaining demurrers to plaintiff's complaint on the grounds that they were barred by WCA exclusivity. The *Tameny* claim was remanded to the Court of Appeal for a determination of whether plaintiff stated such a claim, but the court upheld dismissal of the emotional distress claim. The court concluded that plaintiff's intentional infliction of emotional distress claim, incorporating allegations of employment retaliation in violation of a whistleblower statute and in violation of fundamental public policy, was barred by the WCA exclusivity provisions. In *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, the California Supreme Court once again restated the principle set forth in *Shoemaker* by declaring that the alleged *Tameny* claims for wrongful discharge in retaliation for activity protected by the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) and intentional infliction of emotional distress claims were barred by the exclusive remedy provisions of the WCA.

No further analysis is required by this court on the issue. Our Supreme Court has indelibly held that the exclusivity principle set forth in the WCA bars respondent's claim in this instance and the trial court committed reversible error in failing to grant appellants' motion for JNOV.

DISPOSITION

The judgment of the trial court is reversed. Appellants are awarded costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.